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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re D.F., a Person Coming Under the Juvenile Court Law.	
JESSICA R.,	D062407
Petitioner and Respondent,	(Super. Ct. No. A58064)
v.	
C.F. et al.,	
Objectors and Appellants.	

APPEALS from a judgment of the Superior Court of San Diego County, Cynthia Bashant, Judge. Judgment affirmed.

C.F. and Gerardo C. (together, the parents) appeal a judgment declaring their daughter, D.F., free from their custody and control (Fam. Code, § 7822, subd. (a)(2))[1] upon the petition of D.F.'s guardian, Jessica R. The parents contend that there is not substantial evidence to support the juvenile court's findings that they left D.F. in Jessica's care and custody with the intent to abandon D.F. C.F. additionally contends that the

1 All further statutory references are to the Family Code unless otherwise specified.

court's failure to make its findings by clear and convincing evidence violated her constitutional right to due process, and that, as a matter of law, she did not leave or abandon D.F. Gerardo contends that he is entitled to presumed father status. We reject the parents' contentions and affirm.

I

BACKGROUND

D.F. was born in San Diego County in April 2003, when C.F. was 14 years old and Gerardo was 19 years old. The parents did not provide adequate care for D.F. In late July, Jessica, the maternal great-uncle's girlfriend went to the maternal grandmother's home in Mexico, where the parents were living. Jessica told C.F. that she was willing to care for D.F., but added that if C.F. wished to care for D.F. herself, Jessica would help her obtain public assistance in the United States. C.F. asked Jessica whether C.F. would be able to see D.F. if Jessica were to assume custody. Jessica told C.F. that she could see D.F. whenever she wished by calling the maternal great-uncle.[2] C.F. handed D.F. to Jessica, together with a diaper bag, D.F.'s birth certificate and other papers. Gerardo told Jessica not to forget the diapers and gave them to her. Jessica left with D.F.

A document written in Spanish[3] and executed in Tijuana on August 3, 2003, states, in pertinent part, " I, [C.F.], being of 14 years of age . . . , being in full use of my mental faculties and no one is forcing me, I give up my parental rights for my daughter

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2 Jessica's and the maternal great-uncle's telephone number never changed.

3 C.F. read and wrote Spanish. She did not read or speak English.

[D.F.] before the witnesses that will sign at the end. The reason being that I am not able to care for my child due to my young age and that I am not able to fulfill the need for any costs for the minor knowing that in the future I will have no rights towards the minor and I will not be able to reclaim her under any circumstances. And, also, since I have no one else's support and I wish to have the best for her, so I give up all of my rights to [the maternal great-uncle] and [Jessica] . . . ." C.F., Jessica, the maternal great-uncle, the maternal grandmother and Jessica's sister all signed the document. In addition, C.F. placed her fingerprint by her signature. Jessica and the maternal grandmother testified that they explained the document to C.F. and Jessica's sister testified that C.F. read the document before signing it.

The parents later claimed that the maternal grandmother gave D.F. to Jessica and the maternal great-uncle against the parents' will, in August 2003, and that when the parents requested D.F.'s return, family members threatened them.[4] In the fall of 2003, the parents reported to Mexican authorities that D.F. had been kidnapped. On December 1, C.F. called the maternal great-uncle and asked to visit D.F. In response, Jessica took D.F. to see the parents. During the visit, Jessica stated that she planned to adopt D.F. At the end of the visit, the maternal great-uncle served C.F. with a guardianship consent form. He translated the form from English to Spanish, and C.F. signed the form.

On December 9, 2003, Jessica filed a guardianship petition in probate court in San Diego County. In a declaration accompanying the petition, Jessica stated that she did not

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4 Jessica and other witnesses denied that there had been any threats.

know the name of D.F.'s father, and that his whereabouts were unknown. Jessica also declared that she did not know anyone who knew the father and that the father had never seen D.F.[5]

Jessica and the maternal great-uncle invited C.F. to D.F.'s first birthday party, but C.F. did not attend. On June 14, 2004, Jessica was granted guardianship of D.F. A short time later, Jessica began receiving foster care funding for D.F.'s support. Soon after the guardianship was established, C.F. called the maternal great-uncle from a public telephone and requested a visit with D.F. in a park near the border. C.F. said she would call back to find out whether Jessica agreed to the visit. The visit did not take place because C.F. did not call back.

In 2008, the parents moved to Texas. In 2010, they married. C.F. remained in contact with maternal relatives and attended family gatherings, but never asked about D.F. In April 2011, C.F. received a letter from "the San Diego Child Support Division." The parents contacted Texas law enforcement authorities, who referred them to the Federal Bureau of Investigation. In September, the parents attended a hearing in probate court.[6] In October 2011, they filed a document in the San Diego County Superior Court stating that they wished "to stop the process that Jessica . . . and [the maternal great-

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5 At the time she prepared the guardianship petition, Jessica knew Gerardo simply as "Herra." The juvenile court aptly noted that in light of Gerardo's lack of interest in D.F., it was understandable that Jessica made little effort to locate him or to find out his name. C.F.'s contention that Jessica "likely procured [the guardianship] by fraud" is irrelevant to the issues on appeal.

6 There are no details in the record regarding the hearing.

uncle] have in court to get the adoption of our daughter [D.F.] . . . ." The document further stated that Jessica and the maternal great-uncle had "stole[n]" D.F. when she was a baby and that they had obtained "custody by presenting false information and a letter that [C.F.] didn't sign," and retained custody by "doing illegal things." The parents claimed that they had looked for D.F. "all these years," and had tried, unsuccessfully, to obtain information from relatives, particularly the maternal grandmother concerning D.F.'s whereabouts. The parents discovered that D.F. was living in San Diego County at the time C.F. received the letter regarding child support.

On December 15, 2011, Jessica filed a petition to free D.F. from parental custody and control (§ 7822, subdivision (a)(2)). On June 5, 2012, the court found that the parents had voluntarily given D.F. to Jessica, and that the parents' failure to contact or attempt to contact D.F. for the next eight years demonstrated that they intended to abandon her. The court noted that "[t]his appears to be a very tight-knit family," making it "very difficult to believe that [C.F.] could not find out . . . [D.F.'s] or [the maternal great-uncle's] or Jessica's whereabouts . . . from any family member if she truly tried." The court further found that the parents' testimony of "threats, fear, guns to the head leading to their not pursuing [D.F.]" was not credible. The court granted the petition.

II

Gerardo Is Not Entitled to Presumed Father Status

If a man "is not a presumed father of a child, the child can be adopted without his consent, and his parental rights can be terminated, unless the court determines it is in the child's best interest for him to retain his parental rights." (*Adoption of Daniele G.* (2001)

87 Cal.App.4th 1392, 1395.) None of the parties raised the issue of Gerardo's presumed father status in the juvenile court. The court raised the issue itself and found that Gerardo was not a presumed father. Gerardo now contends that he is a presumed father pursuant to section 7611. He does not specify a particular subdivision of section 7611 under which he claims to qualify as a presumed father, but appears to suggest that "[h]e receive[d] the child into his home and openly [held] out the child as his natural child." (§ 7611, subd. (d).) Neither that subdivision nor any other assists Gerardo.

To support his claim of presumed father status, Gerardo cites the parents' testimony that he lived with C.F. and D.F. when D.F. was a baby, C.F.'s testimony that he supported them at that time, Jessica's testimony that she assumed that Gerardo was the father because he lived with C.F. while she was pregnant and his own testimony that after he and C.F. moved to Texas, he tried to add his name to D.F.'s birth certificate.[7]

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[7] Gerardo was not present at D.F.'s birth and his name is not on her birth certificate.

Gerardo argues that the juvenile court was not able to observe the demeanor of two witnesses, C.F.'s brother and the maternal great-uncle, and therefore "was prevented from determining if [they] colluded prior to testifying." The two witnesses testified telephonically because their felony convictions barred them from entering the United States. Initially, the parents did not object to telephonic testimony. However, as soon as C.F.'s brother began testifying, C.F.'s counsel objected on the ground that an oath taken in a foreign country was of no effect. The court overruled the objection. Gerardo's counsel then objected to the testimony of both witnesses on the ground "that the border patrol supervisor would not disclose the nature of [the derogatory] information [leading to the denials of entry into the United States]." The court overruled that objection as well, stating that the derogatory information had been explored in great detail, and adding that the parents' attorneys "certainly have the ability to cross-examine the witnesses if you have any further questions." After the maternal great-uncle was sworn, Gerardo's counsel again objected. The parents' attorneys cross-examined the two witnesses regarding their criminal records. The court did not err by overruling the objections. Proceeding in this manner was within the court's discretion. (Cal. Rules of Court, rule 5.9(b).)

There is not substantial evidence that Gerardo is a presumed father. (*In re Spencer W.* (1996) 48 Cal.App.4th 1647, 1653.) The parents did not move to Texas until D.F. was four or five years old. Additionally, there was evidence that when D.F. was a baby, the maternal grandmother cared for her and supported her and the parents. Gerardo was physically violent with C.F. and exposed D.F. to the violence. The court found C.F.'s testimony that Gerardo attempted "to raise or perfect paternity" not credible. The court found credible the witnesses who testified that when D.F. was a baby, Gerardo denied that he was the father. We will not second guess these credibility determinations. (*In re A.M.* (2010) 187 Cal.App.4th 1380, 1390; *In re S.A.* (2010) 182 Cal.App.4th 1128, 1140.)

Gerardo contends that even if he is not a presumed father, he is a *Kelsey S.* father (*Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 849). A *Kelsey S.* father is an unwed biological father who "promptly comes forward and demonstrates a full commitment to his parental responsibilities--emotional, financial, and otherwise" (*ibid.*), but "was prevented from taking the child into his home by a third party." (*In re Elijah V.* (2005) 127 Cal.App.4th 576, 582.) In evaluating whether a man is a *Kelsey S.* father, the relevant factors are "his conduct before and after the child's birth, including whether he publicly acknowledged paternity, paid pregnancy and birth expenses commensurate with his ability to do so, and promptly took legal action to obtain custody of the child. [Citation.] He must demonstrate a full commitment to his parental responsibilities within a short time after he learned that the biological mother was pregnant with his child. [Citation.] He must also demonstrate a willingness to assume full custody. [Citation.]" (*In re Elijah V.*, at p. 583.)

Gerardo argues that D.F. was taken from the parents against their will, and maintains that continuing threats of violence prevented the parents from finding and contacting D.F. As noted above, the court found that the parents' testimony regarding threats was not credible. The court found credible the testimony that Gerardo's "actions appeared supportive of Jessica taking [D.F.] . . . ." There is substantial evidence to support the conclusion that Gerardo is not a *Kelsey S*. father. (*In re Sarah C*. (1992) 8 Cal.App.4th 964, 972-973.)

III

C.F. Was Not Deprived of Due Process

The form minute order for the June 5, 2012, hearing states that the court found, by clear and convincing evidence, that it was in D.F.'s best interests to be freed from parental custody. In its oral pronouncement of judgment, the court did not mention the applicable standard of proof. C.F. contends that the court failed to make its findings by clear and convincing evidence, as required by law, violating her due process rights. She argues that "the reporter's transcript controls over the minute orders." This argument presupposes that there is a conflict between the reporter's transcript and the minute order. (*In re Merrick V.* (2004) 122 Cal.App.4th 235, 249, citing *People v. Smith* (1983) 33 Cal.3d 596, 599.) However, there is no conflict. Further, nothing in the reporter's transcript suggests that the court was unaware of the standard of proof, or that it applied a lesser standard than the one required. There is therefore no reason to avoid the presumption that the court acted properly in reaching its decision. (*In re Elizabeth M.* (2008) 158 Cal.App.4th 1551, 1556, citing Evid. Code, § 664.)

IV

Substantial Evidence Supports the Finding That the Parents Left D.F. with Jessica with the Intent to Abandon D.F.

A child may be declared free from parental custody and control if "[t]he child has been left by both parents or the sole parent in the care and custody of another person for a period of six months without any provision for the child's support, or without communication from the parent or parents, with the intent on the part of the parent or parents to abandon the child." (§§ 7822, subd. (a)(2), 7820.) The petitioner had the burden to establish each of these elements by clear and convincing evidence. (§ 7821.) The purpose of section 7822 "is to promote the child's best interest 'by providing the stability and security of an adoptive home.' (§ 7800.) The statute is to 'be liberally construed to serve and protect the interests and welfare of the child.' (§ 7801.)" (*Adoption of Allison C.* (2008) 164 Cal.App.4th 1004, 1009-1010.)

" 'The controlling issue for a finding of abandonment is the subjective intention of the parent[,]' " but " '[i]ntent to abandon . . . may be found on the basis of an objective measurement of conduct, as opposed to stated desire.' " (*In re Brittany H.* (1988) 198 Cal.App.3d 533, 550.) "In determining a parent's intent to abandon, the trial court may consider not only the number and frequency of his or her efforts to communicate with the child, but the genuineness of the effort under all the circumstances [citation], as well as the quality of the communication that occurs [citation]." (*In re B.J.B.* (1986) 185 Cal.App.3d 1201, 1212.) "The . . . failure to communicate is presumptive evidence of the intent to abandon. If the parent or parents have made only token efforts

to . . . communicate with the child, the court may declare the child abandoned by the parent or parents." (§ 7822, subd. (b).) "The parent need not intend to abandon the child permanently; rather, it is sufficient that the parent had the intent to abandon the child during the statutory period." (*In re Amy A.* (2005) 132 Cal.App.4th 63, 68, citing *In re Daniel M.* (1993) 16 Cal.App.4th 878, 885.)

The parents contend that the court erred by rejecting their version of the facts and instead accepting Jessica's version. We decline the parents' implicit request that we reweigh the evidence and reexamine the trial court's credibility determinations. " 'The questions of abandonment and of intent . . . are questions of fact for the resolution of the trial court.' [Citation.]" (*In re Marriage of Jill & Victor D.* (2010) 185 Cal.App.4th 491, 506.) "We apply the substantial evidence standard of review [citation]; in applying this standard, we do not pass on the credibility of witnesses, resolve conflicts in the evidence, or determine the weight of the evidence. [Citation.] We simply determine whether there is substantial evidence, believed by the trial court, that supports the court's findings. [Citation.]" (*Id.* at p. 503.)

The testimony in this case was conflicting, and the court's credibility determinations are dispositive on appeal. The court properly credited the testimony of many witnesses showing that the parents voluntarily left D.F. in Jessica's care and custody in August 2003 and for the next eight years made no attempt to find D.F. The court properly found that in light of the closeness of the family, C.F. could have found D.F., the maternal great-uncle or Jessica. There is substantial evidence to support the

court's findings that the parents left D.F. in Jessica's care and custody for longer than the statutory period, without communication, with the intent to abandon D.F.

V

C.F. Is Incorrect in Contending That She Did Not Leave or Abandon D.F. as a Matter of Law

C.F. contends that when the court ordered a guardianship in 2004, D.F.'s custody status became a matter of judicial decree, and maintains that because this decree was in place, her subsequent conduct did not constitute a leaving or an abandonment of D.F.[8]

"[A] parent 'leaves' a child by ' "voluntarily surrender[ing]" ' the child to another person's care and custody." (*In re Amy A., supra,* 132 Cal.App.4th at p. 69, italics omitted.) "[A] parent will not be found to have voluntarily left a child in the care and custody of another where the child is effectively 'taken' from the parent by court order [citation]; however, the parent's later voluntary inaction may constitute a leaving with intent to abandon the child [citation]." (*In re Marriage of Jill & Victor D., supra,* 185 Cal.App.4th at p. 503.) "[T]he leaving-with-intent-to-abandon-the-child requirement of section 7822 can be established by evidence of a parent's voluntary inaction after an order granting primary care and custody to the other parent. [Citations.] [¶] Simply stated, 'nonaction of the parent after a judicial decree removing the child may convert a [judicial] "taking" into a "leaving" [of a child by the parent].' [Citations.]" (*Id.* at p. 504.) Further,

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8 C.F. contends that the August 3, 2003, document had a similar effect, and "the . . . court failed to consider [her] age and likely coercion in signing that document." There is no indication that the court failed to consider C.F.'s age or any of the other circumstances surrounding the signing of the document, and there is substantial evidence to support the court's finding that the parents gave up D.F. voluntarily.

"[i]n the event that a guardian has been appointed for the child, the court may still declare the child abandoned if the parent or parents have failed to communicate with . . . the child . . . ." (§ 7822, subd. (b).)

Here, the first judicial decree, the June 14, 2004, guardianship, occurred more than 10 months after C.F. voluntarily ceded her parental rights to Jessica on August 3, 2003, *after* the expiration of the six-month period specified in section 7822, subdivision (a)(2). Further, if, as C.F. claims, she became aware that there was a guardianship only when she received the request for child support in April 2011, her failure to take action during the intervening nearly eight years cannot be attributed to the existence of the guardianship. On the other hand, if C.F. was aware of the guardianship earlier, her "repeated inaction in the face of the [guardianship] provides substantial evidence that [s]he voluntarily surrendered h[er] parental role and thus 'left' [D.F.] within the meaning of section 7822." (*In re Amy A.*, *supra*, 132 Cal.App.4th at p. 70.)

In *In re Amy A.*, the mother and daughter moved out of the father's home at his suggestion. The father refused to have any contact with his daughter for more than two years. During that time, the mother obtained a divorce; the court granted her sole legal and physical custody and granted the father visitation. (*In re Amy A.*, *supra*, 132 Cal.App.4th at p. 66.) The mother remarried, and the court granted her husband's section 7822 petition. (*Id*. at pp. 65, 67.) This court rejected the father's contention that the custody order precluded a finding that he had left his daughter, noting that he had not appeared in the divorce proceedings or made any attempt to seek modification of the custody order or exercise his visitation rights. (*Id*. at p. 70.)

In re Jacklyn F. (2003) 114 Cal.App.4th 747, on which C.F. relies, is distinguishable from the instant case. In that case, the grandparents filed a guardianship petition three days after the mother left the child in their care. The mother filed an opposition, sought the child's return and appeared at a hearing slightly more than a month after the petition was filed. The reviewing court concluded, "[o]nce the guardianship was granted, . . . the minor's custody status became a matter of judicial decree, not abandonment." Thus, the mother's "conduct following the granting of the guardianship—which included sending 'stacks' of letters to the minor but failing to visit her—did not constitute 'parental nonaction' amounting to a leaving." The court did "not discount the possibility that, under different circumstances, it might be proper to conclude that a parent has 'left' a child within the meaning of section 7822 despite court intervention . . . ." (*Id.* at p. 756.) Such circumstances exist here. Unlike the mother in *In re Jacklyn F.*, at page 747, C.F. made no effort to communicate with D.F. following the guardianship until she was contacted about child support years later.

DISPOSITION

The judgment is affirmed.

AARON, J.

WE CONCUR:

HALLER, Acting P. J.

MCINTYRE, J.